



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII



IN THE MATTER OF)
)
MASJID AL MU'MINUN, INC.) Docket No. TSCA-7-99-0026
)
Respondent)

DECISION ON MOTION FOR DEFAULT ORDER

This decision is upon motion for issuance of a default order in this matter, which seeks assessment of a civil penalty. For the reasons stated herein, the motion is denied.

Background

This matter was initiated pursuant to section 207(a) and section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§2647(a) and 2615, by the filing of an administrative complaint on April 6, 1999. The complaint, issued by the Director, Air RCRA & Toxics Division, Environmental Protection Agency, Region VII ("Complainant"), contained one count alleging violations of two requirements of TSCA, and implementing regulations, relating to the abatement of asbestos hazards in school buildings. The complaint proposed to assess two alternative penalties for the violations, including a penalty of \$5,500, and a "reduced penalty" of \$2,000. Complaint, ¶22. According to the complaint, the latter penalty proposal was based on "the nature of Respondent as a small business of unknown size." Complaint, ¶23. The complaint characterized the \$5,500 proposal as the "actual calculated proposed penalty," and indicated that Complainant might "reinstate" the higher amount if "Respondent does not qualify as a small business." Id.

The complaint was directed to Masjid Al Mu'minun, Inc., described in the complaint as the owner of the Clara Mohammed School, located in St. Louis, Missouri (hereinafter "Respondent"). The record indicates that the complaint was received at Respondent's mailing address on April 8, 1999, and that Respondent did not file an answer or other response to the complaint within the time allowed by the applicable procedural rule, 40 C.F.R. §22.15(a). To date, Respondent has not filed an answer or other response to the complaint.

On June 10, 1999, counsel for the Complainant filed a motion for a default order based on Respondent's failure to file an answer to the complaint.¹ The record indicates that Respondent was served with the motion and a proposed default order, and to date has not responded to the motion. The time allowed for responding to the motion under 40 C.F.R. §22.16(b) has expired.

Discussion

A default order recommending the assessment of a penalty must contain elements necessary to ensure that procedural safeguards are afforded, including a delineation of the specific factual basis for the derivation of the penalty to be assessed.² See, Katzson Bros., Inc. v. United States Environmental Protection Agency, 839 F. 2d 1396, 1400-01 (10th Cir. 1988). A "conclusory finding" of the appropriateness of a particular penalty amount is insufficient. Id. For a default order to contain the specific factual basis for the penalty, the record must provide

¹The motion appears to be identical to a motion which had been filed previously, but for which there was no return receipt. The record indicates that the June 10, 1999 motion was received at Respondent's business address on June 14, 1999.

²Among others, a default order must include "findings of fact showing the grounds for the order." 40 C.F.R. §22.17(c).

that basis. Here, the record contains only conclusory statements concerning the derivation of the penalty and does not contain an adequate factual basis to support a penalty order.

In this matter, Complainant's argument in support of its motion for a default order is contained in the proposed default order, rather than in the motion or statement in support of the motion. However, since the proposed order was filed with the motion, and was served on the Respondent along with the motion, I have considered the statements in the proposed order in reaching my decision.

The proposed order discusses the penalty calculation in paragraphs 19 through 23. The discussion consists primarily of recitals of the factors considered by Complainant.³ However, other than a statement that Respondent had no history of prior violations (¶¶19, 23) ("history of previous violations" being one of several factors to be considered in penalty assessment under TSCA), Complainant has not submitted any specific factual information concerning the nature of the Respondent or the violations alleged in the complaint which would permit independent review of the appropriateness of the penalty requested by Complainant.⁴ See, Katzson Bros., supra, at 1401. In addition, the motion and supporting documents do not address, in any manner, two of the statutory criteria which are required to be considered by the Administrator, relating to ability of the violator to pay the penalty, and "the ability of the violator to continue to provide educational services to the community." TSCA, section 207(c)(1)(C) and (D). Regarding the

³For example, the proposed order states that "Complainant asserted that it took due notice of the nature, circumstances, extent and gravity of the above-cited violations in accordance with TSCA Section 207." Complaint, ¶20.

⁴Although not mandated by the applicable rules of practice, submission of an affidavit by an individual responsible for calculating a specific penalty might assist in providing factual information necessary to show how the penalty factors have been applied to a specific case.

effect of the requested penalty on Respondent, the Complainant seems to rely solely on the argument that the amount sought is significantly less than the statutory maximum. However, Complainant does not address the impact of the “reduced” penalty on the Respondent.

Because Complainant’s motion and proposed order lack the factual basis necessary to support the assessment of a penalty, the motion for issuance of a default order is denied.

Dated: July 23, 1999

/S/

Robert L. Patrick
Regional Judicial Officer
Region VII